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Supreme Court, U.S.
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Nos. 95-1197 and 95-1200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ZELL MILLER, ET AL.,

Cross-Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, CROSS-RESPONDENTS (NO. 95-1200), *and* NATIONAL ASSOCIATION OF BROADCASTERS, et al., CROSS-RESPONDENTS (NO. 95-1197),

Cross-Respondents,

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 315(b) of the Communications Act of 1934 provides that during certain periods the charges made for use of any broadcasting station by political candidates shall not exceed the lowest unit charge of the station for the same class and amount of time for the same period. The Federal Communications Commission ("FCC") issued an order (the "Declaratory Ruling") purporting to preempt all state causes of action dependent on any determination of the lowest unit charge under Section 315(b), or of any other duty arising under that subsection, and purporting to constitute the FCC as the sole forum for adjudicating such matters. The questions *conditionally* presented by the Cross-Petitioners are:

(1) whether the Cross-Petitioners presented a justiciable case or controversy to the court of appeals; and

(2) assuming that this Court rules both that a justiciable case or controversy was presented and that the FCC had authority to issue the Declaratory Ruling, (a) if this Court determines that the FCC had authority to interpret the intent of Congress, whether Congress intended the preemption effected by the Declaratory Ruling, and (b) if this Court determines that the FCC's authority was plenary, whether the FCC's exercise of that authority in this proceeding was arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The petitioners in the court of appeals were Zell Miller; Zell Miller For Governor; Pierre Howard; Georgians For Howard '90; Johnny Isakson; Johnny Isakson For Governor; Andrew Young; Young Working For Georgia; Lauren McDonald; Lauren McDonald For Governor; Roy Barnes; Roy Barnes For Governor; Tim Ryles; Tim Ryles For Insurance Commissioner; Warren Evans; Warren Evans Election Committee; William L. Dickinson, Second District Campaign Committee; William J. Cabaniss; Friends of Bill Cabaniss Committee; Spencer T. Bachus, III; Bachus For Attorney General Committee; John Teague; James E. Folsom, Jr.; Jim Folsom, Jr. For Lieutenant Governor Committee; Fob James; Fob James For Governor Committee; Kenneth D. Wallis; Alabamians For Ken Wallis Committee; George D.H. McMillan, Jr.; The McMillan Committee; George Wallace, Jr.; Wallace For Treasurer Committee; Charles A. Graddick; Graddick For Governor Committee; William J. Baxley; Friends Of Bill Baxley; Paul Hubbert; Richard Shelby; Don Siegelman; Jimmy Sullivan; Sonny Hornsby; Friends of E.C. Sonny Hornsby; Mark Kennedy; Judge Mark Kennedy For Supreme Court; and Friends Of Judge Mark Kennedy (collectively, the "*Candidates*"). The Candidates are the Cross-Petitioners and Respondents in this Court, and have filed, simultaneously herewith, a consolidated Brief In Opposition to Petitions for Writs of Certiorari in Nos. 95-1197 and 95-1200.

The United States and the Federal Communications Commission were respondents in the court of appeals. The United States and the Federal Communications Commission are the Petitioners and Cross-Respondents in No. 95-1200.

Respondents-intervenors in the court of appeals were Capital Cities/ABC, Inc.; Chris-Craft Industries, Inc.; The Times Mirror Company; American Family Broadcast Group, Inc.; Allbritton Communications Company; CBS, Inc.; Chronicle

Publishing Co.; Fox Television Stations, Inc.; Gillett Broadcasting of California, Inc.; Gillett Communications of San Diego, Inc.; Great American Television and Radio Company, Inc.; Kelly Broadcasting Company; Kelly Television Company; Lin Television Company; McCraw-Hill Broadcasting Company, Inc.; Midwest Television, Inc.; National Broadcasting Company, Inc.; The New York Times Company; Post-Newsweek Stations, Inc.; The Providence Journal Company; The Spartan Broadcasting Company; Tribune Broadcasting Company; Westinghouse Broadcasting Company, Inc.; WKRG-TV, Inc.; WTVT, Inc.; Meredith Corporation; A.H. Belo Corporation; Cosmos Broadcasting Corporation; Cox Enterprises, Inc.; and the National Association of Broadcasters (collectively, the "*Broadcasters*").The Broadcasters are the Petitioners and Cross-Respondents in No. 95-1197.

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FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, CROSS-RESPONDENTS (NO. 95-1200), AND NATIONAL ASSOCIATION OF BROADCASTERS, ET AL., CROSS-RESPONDENTS (NO. 95-1197),

Cross-Respondents,

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A Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioners are legally qualified candidates for public office (the "Candidates") who filed a petition in the court below for review of a declaratory ruling issued by the Federal Communications Commission (the "FCC"). Cross-Petitioners respectfully urge that if the Court grants either the Petition For a Writ of Certiorari filed by the FCC (No. 95-1200) or the Petition For a Writ of Certiorari filed by the National Association of Broadcasters et al. (the "Broadcasters") (No. 95-1197), that it also grant this Cross-Petition to enable the Court to address fully the relevant issues in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals is reported at 66 F.3d 1140. The Declaratory Ruling of the FCC is reported at 6 F.C.C. Rcd 7511. The FCC's order on reconsideration is reported at 7 F.C.C. Rcd 4123. The FCC's notice of its intention to issue the Declaratory Ruling is reported at 6 F.C.C. Rcd 5954. Each of these opinions below is reproduced in full in the Appendix (hereinafter the "*FCC App.*") to the Petition for A Writ of Certiorari filed in No. 95-1200 by the FCC (hereinafter the "*FCC Petition*").

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1995. On December 21, 1995, Justice Kennedy entered an order extending the time within which to file a petition for a writ of certiorari to and including January 26, 1996. The FCC and the Broadcasters each filed separate Petitions for a Writ of Certiorari on January 26, 1996. The Broadcasters' Petition was docketed in this Court as No. 95-1197 on January 26, 1996. The FCC's Petition was docketed in this Court as No. 95-1200 on January 29, 1996. Pursuant to this Court's Rule 12.5, this consolidated Cross-Petition for a Writ of Certiorari, filed in Nos. 95-1197 and 95-1200, is timely filed on February 26, 1996, within 30 days after the Broadcasters' Petition was first docketed in this Court on January 26, 1996 in No. 95-1197. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

1. Article III, Section 2 of the United States Constitution, which provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of

> the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party; to Controversies . . . between Citizens of different States . . ..

2. Section 315 of Title 47, United States Code, which provides in part:

> (b) **Broadcast media rates**
>
> The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election to such office shall not exceed —
>
> > (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
> >
> > (2) at any other time, the charges made for comparable use of such station by other users thereof.
>
> * * * *
>
> (d) **Rules and regulations**
>
> The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

3. Section 401(b) of Title 47, United States Code, which provides:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney

> General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, the court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

4. Section 402(a) of Title 47, United States Code, which provides:

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

5. Section 2342 of Title 28, United States Code, which provides in part:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by Section 402(a) of title 47 . . ..

STATEMENT OF THE CASE

The Cross-Petitioners filed a petition in the court of appeals to review a declaratory ruling (the "Declaratory Ruling") issued by the FCC. The Cross-Respondents are the United States of America and the FCC (No. 95-1200), and the Broadcasters (No. 95-1197). Cross-Petitioners incorporate herein by reference the Statement of the Case set forth in their Brief in

Opposition to Petitions for Writs of Certiorari filed simultaneously herewith in these proceedings.

In addition, the Candidates submit the following facts. The Declaratory Ruling was issued by the FCC on its own motion. *FCC App.* at 17a. According to the FCC, the FCC's conclusions were based upon its review of the comments and its own independent legal analysis. *FCC App.* at 18a. In the Public Notice inviting comments, the FCC cited litigation in several states where candidates for elective office had sued broadcast stations for charging rates allegedly in excess of those permitted by Section 315(b), and the inconsistent rulings with regard to jurisdiction that had been issued in such cases. *FCC App.* at 87a-94a. Except for the comments and petitions for reconsideration, there were no further filings in the proceeding and no evidence was taken.

REASONS FOR GRANTING THE CROSS-PETITION

This proceeding involves the most recent in a series of orders issued by the FCC pursuant to which the FCC has undertaken to preempt, by "declaratory ruling," a wide range of state laws and regulations relating to interstate and foreign radio and wire communications. *See, e.g., City of New York v. FCC*, 486 U.S. 57 (1988)(preemption of signal-quality regulation of cable television); *State Corp. Comm'n v. FCC*, 787 F.2d 1421 (10th Cir. 1986) (preemption of state utility commission's altering of sampling periods used by local telephone companies to allocate equipment costs); *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (preemption of state and local entry regulation of SMATV systems); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984) (preemption of state restrictions on the resale and sharing of all interstate WATS service used exclusively in interstate commerce); *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982) (preemption of New York cable television

statute which prohibited receipt of federally authorized pay programming on MATV systems).

This proceeding is unique because, for the first time, the FCC purports to have the authority to determine the constitutional question of whether a state law cause of action is preempted by federal law, the authority to oust the state courts (and the federal district courts in diversity cases) from jurisdiction to make any determinations under Section 315(b) of the Communications Act, to constitute itself as the sole forum for adjudicating such matters, and to enact procedures for such adjudications.

If this Court chooses to grant either of the Petitions for a Writ of Certiorari, and chooses to rule on the validity of the Declaratory Ruling, as requested in each of the Petitions,[1] the Court should also grant this Cross-Petition to address the unique issues raised by the Candidates in the court of appeals.

A. This Court Should Clarify the Circumstances Under Which a Declaratory Ruling of the FCC is Subject to Judicial Review.

The Candidates filed their petition for review in the court of appeals pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The court of appeals, after concluding that the FCC had no authority to issue a ruling preempting state causes of action, or ousting the jurisdiction of the courts, declined to rule on the issue of whether Congress itself intended to preempt any such state causes of action. The court of appeals held that notwithstanding the Declaratory Ruling the courts were free to decide such constitutional issues in any judicial action filed by the Candidates, and that the court of appeals would decline to

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[1] As the Candidates set forth more fully in their Brief In Opposition to Petitions for Writs of Certiorari, it does not appear that this Court can or should reach the validity of the Declaratory Ruling, since the court of appeals itself did not. "This Court does not normally review orders of administrative agencies in the first instance . . .." *Civil Aeronautics Bd. v. American Air Transport, Inc.*, 344 U.S. 4,5 (1952).

issue an advisory opinion on the issue of Congressional intent. *FCC App.* at 15a.

Given that the court of appeals had concluded that the FCC had no authority to issue the Declaratory Ruling, the court of appeals properly declined to give an advisory opinion on the issue of Congressional intent. The court of appeals' concern with issuing an "advisory opinion," however, should not have applied to the issue of the FCC's authority. In the event that this Court grants certiorari, the Candidates submit that the court of appeals should have entertained (rather than dismissed) the Candidates' petition for review, and set aside the Declaratory Ruling, for lack of authority. The putative preemptive effect of the Declaratory Ruling created a sufficient case or controversy. *See, e.g., New England Tel. and Tel. Co. v. Pub. Utils. Comm'n,* 742 F.2d 1, 8 (1st Cir. 1984), *cert. denied*, 476 U.S. 1174 (1986):

> If it [the potential petitioner] had to wait until the regulations were enforced to secure judicial review of their validity, it might have to wait forever, . . . for [it] intended to obey the regulations, to [its] detriment. Thus, to interpret "order" in section 402 to apply only to the outcome of an adjudicatory enforcement proceeding would deprive those who might be seriously injured by . . . obedience to an FCC rule of any opportunity to challenge the rule's legal validity.

B. This Court Should Grant the Cross-Petition To Consider the Impact of the Declaratory Ruling on the Federal Election Campaign Act of 1971.

As set forth in more detail in the Candidates' Brief in Opposition to Petitions for Writs of Certiorari, it is the Candidates' position that the court of appeals correctly concluded that the FCC had no authority, either as a plenary matter, or by construing the intent of Congress, to preempt any state law causes of action or to oust the jurisdiction of any court. For this reason, the Candidates believe that this Court should not reach the validity of the conclusions reached in, or the procedures

adopted by, the Declaratory Ruling. If this Court chooses, however, to review the validity of the Declaratory Ruling, in the manner requested by each of the Petitioners, the Court should also consider the additional arguments raised by the Candidates in support of their petition for review which were not addressed by the court of appeals.

In concluding that Congress itself intended the preemptive effect set forth in the Declaratory Ruling, the FCC relied, almost exclusively, upon the Communications Act. Section 315(b), however, was enacted as part of the Federal Election Campaign Act of 1971 (FECA). *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, Title I, § 103(a)(1), 86 Stat. 4, 7 (1971). FECA is a comprehensive reform measure designed to increase fairness in the political process by reducing campaign costs. *See Buckley v. Valeo*, 424 U.S. 1 (1976). As stated in the preamble to FECA, its purpose was "to promote fair practices in the conduct of election campaigns for Federal political offices . . .." *See also Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1980).

The purpose of FECA was to control spiraling campaign costs. Section 315(b) established a ceiling on the cost of political advertising during the two most important campaign periods. The rights provided by Section 315(b) are meaningless, however, unless there are practical remedies to redress violations. The Declaratory Ruling deprives candidates from across the nation of the opportunity to resort to the relatively inexpensive and expeditious remedies that may be available in the state courts. The cost of a round-trip airline flight to the District of Columbia may be considerably more than the amount of the claim of a candidate for sheriff in New Mexico. An understanding of the workings of the FCC and the skills of the specialized bar who practice before that agency, it is clear, may be beyond the compass of many candidates for public office, and their attorneys. Thus, only the largest claims by the most persistent suitors can be expected to result in filings with the FCC. These considerations, of course, do not apply to the Broadcasters, who are already regulated by the FCC and make regular appearances there.

In contrast to the FCC's ruling in this case, before a court would conclude that a cause of action is implicitly preempted by federal law, it would first determine that an enforceable federal administrative remedy exists to replace the preempted cause of action. *See, e.g., Centel Cable Television Co. v. Admiral's Cove Assocs.*, 835 F.2d 1359, 1363 (11th Cir. 1988). The FCC did not even purport to provide a replacement remedy for some of the causes of action covered by the Declaratory Ruling. For example, a state law collection suit filed by a broadcaster against a candidate might require a determination of the lowest unit charge, if the candidate refused to pay due to an alleged overcharge. No provision is made in the Declaratory Ruling for the FCC to adjudicate such claims, but all such claims are preempted by the Declaratory Ruling.

Even with respect to refund claims asserted by candidates, for which the Declaratory Ruling does purport to provide a remedy, no *enforceable* remedy is provided. In issuing the Declaratory Ruling, the FCC overlooked that Congress had not granted the FCC authority to order refunds of overcharges. Sections 204(a)(1), 206, 207, 208 and 407 of the Communications Act, relating to refunds, apply only to common carriers, not to broadcasters.

The procedures established by the FCC do not comply with the Administrative Procedure Act, conflict with other FCC rules, and are not adequate to enforce Section 315(b) claims. For example, the prescriptions for the form and content of pleadings set forth in the Declaratory Ruling (*see FCC App.* at 27a) conflict with the explicit rules governing these matters in 47 C.F.R. § 1.41 *et seq*. The provisions relating to filing periods and service (*see FCC App.* at 27a) conflict with 47 C.F.R. § 1.45 *et seq*. The extremely limited discovery periods, which apply only to the broadcasters' records related to rates, terms and conditions for advertising during the relevant periods (*FCC App.* at 28a), conflict with the broader discovery provisions of 47 C.F.R. § 1.315 *et seq*., and applicable state civil practice acts. These abbreviated procedures also conflict with the provisions of 5 U.S.C. §§ 556

and 559 relating to the conduct of hearings, and requirements or privileges relating to evidence.

The Declaratory Ruling does not confide the Section 315(b) claims to a "specially constituted tribunal" or prescribe a "particular procedure for investigation, complaint and notice, and hearing and decision" as would be required even if Congress itself had established these procedures. *See Garner v. Teamsters, Chauffers & Helpers Local Union*, 346 U.S. 485, 490 (1953). Instead, the FCC's "Mass Media Bureau" is permitted to consider these claims, without any time limits imposed on the decision. *See FCC App.* at 27a-28a. This Court struck down similar rules enacted by the FSLIC for this very reason. *See Coit Independence Joint Venture v. FSLIC,* 489 U.S. 561, 586 (1989) (Petitioners' "claim has essentially been relegated to a 'black hole' from which it may not emerge before the statute of limitations on [petitioner's] state law claims has run.")

Even if the FCC issues an order for the payment of a refund, Section 401(b) of the Communications Act specifically excludes orders for the payment of money from the scope of the orders which may be enforced by the courts. Thus, any refund order could not be enforced by any candidate, and the Declaratory Ruling seriously undermines and thwarts the statutory purpose of FECA to reduce campaign costs.

C. This Court Should Grant the Cross-Petition to Clarify the Circumstances Under Which An Executive Agency May Interpret the Intent of Congress, and the Binding Effect of Any Such Interpretation.

As set forth in the Candidates' Brief in Opposition to Petitions for Writs of Certiorari, it is the Candidates' position that the FCC has no authority to issue an opinion, which is binding on the courts, interpreting Congressional intent on constitutional issues such as the preemption of state law causes of action. If the Court grants either of the Petitions, however, and reaches the correctness of the FCC's "opinion" on these issues, the Court

should grant the Cross-Petition to consider the unique issues raised by the Candidates on these issues in the court of appeals.

Assuming that the FCC could issue a declaratory ruling of this type, there is no reasonable basis for the FCC's conclusion that Congress, by implication, intended to preempt state law causes of action involving the lowest unit charge provision. The regulations governing Section 315(b) are explicit and reasonably detailed, the power to prescribe and revise regulations under this section remains in the FCC, and all judicial interpretations of Section 315(b) are subject to review. Permitting the state courts to have concurrent jurisdiction over Section 315(b) claims "creates no significant danger of inconsistent application of federal . . . law" because "[s]tate court judgments misinterpreting federal . . . law would, of course, also be subject to direct review by this Court." *Tafflin v. Levitt*, 493 U.S. 455, 464 (1990). In the absence of Congressional action, primary jurisdiction, not implied exclusive federal jurisdiction, is the concept, if any, which is responsive to the FCC's uniformity concerns. *See United States v. Western Pac. R.R.*, 352 U.S. 59, 64 (1956) (where the doctrine applies, "the judicial process is suspended pending referral of such issues to the administrative body for its views.").

The FCC relied on four types of cases in concluding that Congress intended to preempt all state law causes of action dependent on a determination under Section 315(b). None of these categories of cases, however, provides any support for the Declaratory Ruling.

(i) **Implied Federal Cause of Action.** The FCC first postulated that there is no implied *federal* cause of action for damages under Section 315(b). This postulation was the FCC's premise for its own conclusion that Congress intended to preempt all *state* law causes of action requiring a determination of the lowest unit charge. As an initial matter, the FCC's reasoning process was flawed because "preemption and implied private cause of action analyses are distinct modes of divining Congressional intent." *Howard v. Uniroyal, Inc.*, 719 F.2d 1552, 1555-56 (11th Cir. 1983).

It was particularly inappropriate in any event for the FCC to bootstrap its argument for preemption of state causes of action upon its own determination, rather than a court's determination, of whether there is a private federal cause of action for violation of Section 315(b). As set forth in the Candidates' Brief in Opposition, this is an issue peculiarly reserved for determination by the courts.[2]

In concluding that there is no private federal cause of action for violations of Section 315(b), the FCC's principal and repeated reliance was upon *Belluso v. Turner Communications Corp.*, 633 F.2d 393 (5th Cir. 1980), which held that no private federal cause of action will be implied under Section 315(a) of the Act. Mr. Belluso was a gubernatorial candidate who believed that he had the power to hypnotize voters through his television advertisements. After Turner Communications refused to air his advertisements, and after the voters had elected one of his opponents, Mr. Belluso brought an action alleging breach of an implied federal cause of action for damages, to his candidacy and his reputation, based, in part, upon Section 315(a) of the Act (the "equal time rule"). The Candidates submit that the Fifth Circuit's decision in *Belluso* has no bearing on whether a court would imply a cause of action under Section 315(b) of the Act. *Belluso* represents nothing more than a recognition of the long-standing principle that "[s]pecial damages for the loss of a public

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[2] Although the Declaratory Ruling on its face purported to preempt only state law causes of action, the FCC further purported to constitute itself the sole forum for adjudicating all matters requiring any determination under Section 315(b), presumably including any implied federal cause of action pursuant to Section 315(b). If the Declaratory Ruling were construed to oust federal court jurisdiction, such a construction would raise further serious questions of constitutionality under Article III. *See Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 838-39 (1986); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982); *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 65 (1989) (Scalia, J., concurring).

office in an election for that office are too remote and speculative to be recoverable." *Beverly v. Observer Pub. Co.*, 88 Ga. App. 490, 490, 77 S.E.2d 80, 81 (1953).

Even assuming that the existence of an implied federal cause of action under Section 315(b) was relevant to the issues the FCC purported to decide, the FCC ignored the fundamental concept applied by the courts in deciding these issues, that an administrative remedy must first exist if a private cause of action is to be denied. The FCC has no authority to order refunds to be paid by broadcasters; the FCC's refund authority applies only to common carriers. *See* 47 U.S.C. §§ 204(a)(1), 208, and 407. "Precedent indicates that the Supreme Court is more likely to allow a private remedy where Congress provides a benefit but does not provide access to any type of administrative process." *Centel Cable Television Co. v. Admiral's Cove Assocs.*, 835 F.2d 1359, 1363 (11th Cir. 1988).

(ii) **Exclusive Federal Remedies.** The second category of cases relied upon by the FCC consists of cases interpreting Congress' intent with respect to whether administrative remedies under various federal statutes are exclusive. These cases, all of which were decided by courts, not agencies, would not support the Declaratory Ruling because in adopting Section 315(b), Congress merely laid down a substantive rule of law. Congress did not prescribe administrative remedies for violations of Section 315(b). Before exclusive jurisdiction will be implied, a court must inquire whether, among other things, the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . .." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)(*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Even then, however, all detailed regulatory schemes are not exclusive. The Courts look for "special features warranting preemption." *Id.* at 87. The FCC did not demonstrate any special features warranting preemption in this case.

(iii) **Immunity Based Upon Federal Defenses.** The third category of cases relied upon by the FCC consists of cases interpreting Congress' intent with respect to whether compliance with standards set forth in a federal rule affords an immunity from, or a defense to, an otherwise applicable state cause of action. *See, e.g., Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981)(ICC's approval of abandonment of railroad service preempts state causes of action for abandonment). These judicial decisions are not relevant here because the state causes of action preempted by the Declaratory Ruling would never involve actions sanctioned by Section 315(b); they would generally involve alleged violations of Section 315(b). Moreover, this Court specifically reserved the issue in *Kalo Brick* of whether "a damages action can never be brought for an illegal abandonment, or if such an action can be brought, whether Congress might have intended that state and federal courts have concurrent jurisdiction." *Id.* at 323 n.10.

(iv) **Preemptive Effect of Federal Regulations.** The fourth, and final, category of cases relied upon by the FCC in purporting to interpret Congressional intent consists solely of *judicial* determinations of the preemptive effect of federal regulations. These cases are not relevant here because they all involved preemption of state regulations, not the preemption of state causes of action, and not the ouster of state court jurisdiction or federal court jurisdiction in diversity cases. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)(preemption of state prohibition of retransmission by cable television systems of alcoholic beverage advertisements); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982)(preemptive effect of Federal Home Loan Bank Board regulation permitting federally chartered savings and loan association to exercise due on sale clause inconsistent with state law).

Even if this Court believes that "[t]he Commission makes a persuasive case in support of its policy objective, . . . that case must be made to Congress and not to this court." *California v. FCC*, 798 F.2d 1515, 1518 (D.C. Cir. 1986). If the Declaratory

Ruling's uniformity justification were taken to its logical conclusion, there would be nothing to prevent the FCC from preempting all state law causes of action that require an interpretation of any FCC statutory or regulatory provision. However, even if, as the FCC speculates, court enforcement of FCC lowest unit charge claims could result in inconsistent interpretations, "this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction . . .." *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 514 (1962).

Until Congress acts, the present jurisdiction of the courts should not be disturbed. Otherwise, the inclusion of Section 315(b) as a part of the adoption of FECA in 1971 will have failed in its essential purpose to reduce campaign costs. At a bare minimum, the effectuation of Congress' intent in adopting Section 315(b) requires that lowest unit charge disputes be settled by some tribunal. "It is important that they be settled right. But let me insist upon a thing too often overlooked. It is more important still that they be settled." K.N. Llewellyn, *The Bramble Bush* at 135 (1930).

CONCLUSION

The Court has before it the Petition of the FCC and the Petition of the Broadcasters which, in addition to presenting the issues ruled upon by the court of appeals, present to this Court the issue of the validity of the conclusions reached in the Declaratory Ruling. If this Court accepts either of the Petitions and, rather than remanding this proceeding to the court of appeals, decides to rule on all of the issues presented by the Petitioners, this Court should also grant this Cross-Petition to consider, in addition to the issues presented by the Petitioners, the unique issues presented by the Candidates.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

ZELL MILLER, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL CROSS-RESPONDENTS

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QUESTIONS PRESENTED

Section 315(b) of the Communications Act of 1934, 47 U.S.C. 315(b), provides that, during certain periods, broadcast stations must charge political candidates, for their campaign advertising, the "lowest unit charge of the station for the same class and amount of time for the same period." In a declaratory ruling, the Federal Communications Commission (FCC) concluded that all state-law causes of action dependent on a determination of a broadcast station's lowest unit charge had been preempted by Congress, and should be preempted by the FCC under its own authority. The questions presented by the cross-petition are:

1. Whether a case or controversy is presented by respondents' challenge to the declaratory ruling.

2. Whether the FCC properly concluded under its own authority that state-law causes of action dependent on a determination of the lowest unit charge should be preempted.

3. Whether Congress preempted state-law causes of action dependent on a determination of the lowest unit charge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a)[1] is reported at 66 F.3d 1140. The declaratory ruling of the Federal Communications Commission (FCC) (Pet. App. 16a-47a) is reported at 6 F.C.C. Rcd 7511. The FCC's order on reconsideration (Pet. App. 48a-86a) is reported at 7 F.C.C. Rcd 4123. The FCC's notice of its intention to issue a declaratory ruling (Pet. App. 87a-94a) is reported at 6 F.C.C. Rcd 5954.

[1] In this brief, "Pet." refers to the petition in No. 95-1200, and "Pet. App." refers to the appendix to that petition. "Br. in Opp." refers to the candidates' brief in opposition to the petitions in No. 95-1197 and No. 95-1200. "Cross-Pet." refers to the cross-petition, No. 95-1361.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1995. On December 21, 1995, Justice Kennedy entered an order extending the time within which to file a petition for a writ of certiorari to and including January 26, 1996. Petitions for a writ of certiorari in No. 95-1197 and No. 95-1200 were filed on January 26, 1996. The cross-petition for a writ of certiorari was filed on February 26, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The background to this case is set forth in detail in our petition (at 3-14). This case involves preemption of state law under Section 315(b)(1) of the Communications Act of 1934, 47 U.S.C. 315(b)(1), which provides that, during the 45 days before primary elections and the 60 days before general and special elections, broadcast stations must charge legally qualified political candidates "the lowest unit charge of the station for the same class and amount of time for the same period." Before 1990, the lowest-unit-charge rule was enforced exclusively by the FCC (with the exception of one Texas statute that was ultimately held to be preempted).[2]

Beginning in 1990, however, candidates for public office began filing lawsuits against broadcasters in state and federal courts, arguing either that the broadcasters had violated Section 315(b) (which was said to have created a private right of action) or, more commonly, that the broadcasters had violated their

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[2] See *KVUE, Inc.* v. *Moore*, 709 F.2d 922 (5th Cir. 1983), aff'd mem., 465 U.S. 1092 (1984).

contractual obligations, enforceable under state law, to adhere to the federal lowest-unit-charge rule. See Pet. App. 88a-89a. In one of those cases, brought by respondent Zell Miller, the federal district court dismissed the complaint and held that the FCC had exclusive authority to provide a remedy for violations of Section 315(b), but in another case brought by respondent William Dickinson, the district court held that the lawsuit did not present a question arising under federal law, and remanded it to the state courts, where the case is still pending. Pet. App. 88a-89a.

After reviewing the litigation that had arisen involving Section 315(b), the FCC issued, on December 13, 1991, a declaratory ruling that "any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) * * * is preempted by federal law," and that "[t]he sole forum for adjudicating such matters shall be [the FCC]." Pet. App. 16a. In its ruling, the FCC first concluded that "Congress by implication preempted state causes of action of which alleged violations of Section 315(b) are an integral part." *Id.* at 19a. It explained that private litigation in courts around the country over the requirements of Section 315(b) would conflict with Congress's establishment of the FCC as the "centralizing authority" overseeing the "unified and comprehensive regulatory system" governing interstate communications, and political broadcasting in particular. Pet. App. 20a.

The FCC also concluded that it should exercise its own authority to preempt state-law claims based on violations of Section 315(b), whether or not Congress expressly or by implication had preempted such claims. Pet. App. 21a-25a. The FCC stated that preemption of such claims "is necessary to allow the

Commission to 'achieve its purposes' by developing uniform standards for interpreting and enforcing Section 315(b)." Pet App. 22a. Absent preemption, the FCC found, "[r]ulings by courts in numerous jurisdictions around the country almost certainly would produce varying and possibly conflicting determinations" that "would leave both candidates and broadcasters unsure of their respective rights and responsibilities." *Id.* at 22a-23a. Moreover, the FCC pointed out, lawsuits in various States would contravene Congress's objective of removing obstacles to political broadcasting, since it would be "difficult, if not perilous, for broadcasters who serve more than one jurisdiction to provide various candidates prompt, authoritative quotes for the lowest unit charge available to them" (*id.* at 23a), and the prospect of such lawsuits around the country "might encourage some stations simply to refuse to accept political advertisements" (*id.* at 24a).

2. The court of appeals "dismiss[ed]" (Pet. App. 15a) a petition for review of the declaratory ruling brought by a group of political candidates (respondents). *Id.* at 1a-15a. After describing the proceedings before the FCC, the court considered its own jurisdiction to review the declaratory ruling, remarking that "it is necessary to characterize appropriately the FCC action [under review]." *Id.* at 9a-10a. The court then stated:

> The Commission's declaratory ruling—that Congress (or the Commission itself) has preempted the jurisdiction of state courts and federal district courts, in diversity cases, when the candidate claims that the broadcaster's rates exceeded the lowest unit charge—is not a regulation prom-

> ulgated pursuant to section 315(d). * * * [T]he ruling does not define statutory terms, dictate the use of certain industry practices, or prescribe appropriate methods for calculating the lowest unit charge. Furthermore, the declaratory ruling is not an adjudication of a pending case involving a dispute between a candidate and a broadcast station licensee. It is not a decision, a letter of admonition, or an order levying a penalty of forfeiture, a loss of operating authority, or a refund to the candidate.

Id. at 10a. The court further remarked:

> Because it is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction, the FCC's declaratory ruling amounts to an agency opinion—a pronouncement interpreting the Communications Act to the effect that Congress impliedly abolished state and federal court jurisdiction over lowest unit charge violations.

Ibid. (footnote omitted). The court cited no authority for its "axiomatic" proposition.

Having thus "characterize[d]" the FCC's action, the court of appeals concluded that it lacked jurisdiction over the petition for review, because (it believed) there was no case or controversy present. The court stated that, "[e]ssentially, [the candidates] ask this court to declare whether, at some future date, a candidate may bring a breach of contract action in state court contending that a broadcaster's rates exceeded the lowest unit charge and seeking recovery of the overcharge." Pet. App. 12a (footnote omitted). It also remarked that the only question presented in

such a case would be "whether Congress has foreclosed the power of the state court[s]" to entertain suits by candidates against broadcasters. *Id.* at 12a-13a. But, disregarding the fact that at least one of the candidates before the court had (and has) just such a lawsuit against a broadcaster pending in Alabama state court (*id.* at 6a n.2), the court concluded that, "[b]y asking this court to decide what another court should do in a future case, [the candidates] are posing a hypothetical question, the answer to which would be an advisory opinion." *Id.* at 13a.

Although the court therefore stated that it would refuse to rule on the petition for review, it also stated that its "refusal to answer the question [the candidates] pose will not preclude them from obtaining an answer. Any of them who have been or may in the future be overcharged by a broadcaster while running for public office may seek judicial relief." Pet. App. 15a. But, repeating its conclusion that "no case or controversy is presented," the Court stated, "we DISMISS the petition for review." *Ibid.*

DISCUSSION

1. In our petition (No. 95-1200), we show that the court of appeals erred in concluding that the FCC lacked authority to provide, by declaratory ruling, that state-law causes of action dependent on a determination of a broadcaster's lowest unit charge should be preempted. Although respondents oppose our petition, they argue that, if the Court grants certiorari, it should also consider whether the court of appeals had jurisdiction over the case, whether the FCC properly decided to preempt state law, and whether Congress preempted state-law causes of action. See Cross-Pet. 6-8.

We do not oppose the granting of the cross-petition on those issues. As we explain in our reply brief in support of our petition (at 2-3), the issues of jurisdiction and the merits of the FCC's decision to preempt under its own authority are subsumed within the questions presented by our petition. Judicial economy and regulatory certainty would be served by the Court's resolution of the question of Congress's preemptive intent as well. The FCC's declaratory ruling was intended to provide definitive guidance as to Congress's intent in Section 315(b), and that objective would be advanced by this Court's resolution of the preemption issue. Furthermore, the FCC's analysis of Congress's preemptive intent was closely connected to its decision on its own initiative to preempt state law, in that both conclusions involved the agency's analysis of Congress's objectives. See, *e.g.*, Pet. App. 19a-20a, 22a-23a (declaratory ruling's discussion, in both contexts, of statutory objectives of consistency, certainty, and uniformity). Accordingly, the Court should grant the cross-petition to address the entire issue of preemption, in both the statutory and administrative contexts.

2. In their cross-petition, respondents present several arguments on the merits of the case. Similar arguments are also made in their brief in opposition to the government's petition in No. 95-1200, and we have addressed them in our reply brief in that case.

CONCLUSION

The cross-petition for a writ of certiorari should be granted.

Respectfully submitted.

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